Supreme Court, U.S.
FILED
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No.

In The

Supreme Court of the United States

MARY WYATT,
PETITIONER,
vs.

STATE OF ALABAMA, DEPARTMENT OF HUMAN RESOURCES, ET AL.,
RESPONDENTS.

On Petition For Writ Of Certiorari
To The Supreme Court Of the State Of Alabama

PETITION FOR WRIT OF CERTIORARI

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58 pp

May a Licensed Day Care provider sue the State of Alabama, Department of Human Resources, because they violated her procedural due process rights under the 14th Amendment to the Constitution of the United States of America?

May a Licensed Day Care provider sue State of Alabama Employees in their official capacities, because they violated her procedural due process rights under the 14th Amendment to the Constitution of the United States of America?

BEST AVAILABLE COPY

List of All Interested Parties

MARY WYATT,
Plaintiff,

vs.

ERIN WHEELER, AND ERIN WHEELER IN HER CAPACITY AS HEAD OF MOBILE COUNTY DHR, CATHERINE PHILLIPS, AND CATHERINE PHILLIPS IN HER CAPACITY AS AN EMPLOYEE OF MOBILE COUNTY DHR, STATE OF ALABAMA, DEPARTMENT OF HUMAN RESOURCES,
Defendants.

Honorable Herman Thomas
Circuit Judge
205 Government Street
Mobile, AL 36602

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Opinions Below

"Appendix E" will be published in the Southern Reporter. It is unknown if any other opinions below have or will be published.

(vii)

Jurisdiction

The final lower Court decision, "Appendix F", was decided on September 7, 2001. This petition was filed within 90 days of that decision, on December 6, 2001.

Constitutional Provisions Involved

The due process clause of the 14th Amendment to the United States Constitution.

Statement of the Case

Ms. Mary Wyatt has been a licensed family day care provider since February 14, 1992. Both her day and night licenses were to expire on February 14, 1998 (Appendix A, pages A9 and A10).

"The practice in Mobile County for the renewal of a daytime care/nighttime care license changed in 1997." Up until that time the application for renewal would be mailed to the licensee who would complete the application. The license worker would then pick up the license package when she visited the day care home for the renewal inspection.

In 1997 that practice was changed due to staff shortages at the Mobile County Department of Human Resources. As part of the new practice a letter was to be sent to the licensee notifying the licensee that due to serious reductions in staff the licensee would have to complete a self evaluation-application form and return it to the agency at least thirty days prior to the expiration of the license. These forms should have been mailed to the licensee approximately sixty days prior to the expiration of the license. However, from the evidence presented I find that Ms. Wyatt did not receive her letter and packet until March of 1998, which was after the February 14, 1998 expiration of her day and nighttime licenses. This letter stated in part that "we will attempt to renew all licenses as soon as possible, however we are aware that some of your licenses will expire before we have the opportunity to visit your facility. "Ms. Wyatt did not mail the completed license package back to the Department (Appendix A, page A10)".

The Department of Human Resources gave Mary Wyatt no notice of their intent to revoke her license, in violation of their own rules (Appendix G, page A41).

Following inspection visits on May 29, 1998 and July 13, 1998, Catherine Phillips wrote Mary Wyatt a letter on July 23, 1998, denying the renewal of her night-time license. Ms. Phillips correctly informed Ms. Wyatt that she was entitled to a fair hearing as a result of this adverse action. Ms. Wyatt timely requested a fair hearing (Appendix A, page A11).

On October 16, 1998, Erin Wheeler, the head of Mobile County Department of Human Resources, wrote Ms. Wyatt a letter improperly refusing her a fair hearing, alleging incorrectly that Ms. Wyatt's day and night licenses had expired prior to the submission of her application for renewal. Ms. Wheeler informed Ms. Wyatt that she was now operating without a license (Appendix A, page A11).

Catherine Phillips, Erin Wheeler, and their counsel were aware that Ms. Wyatt was entitled to a fair hearing (Minimum Standards Excerpt Appendix G, page A41).

The Department of Human Resource Minimum Standards provide for a fair hearing for Ms. Wyatt (Appendix G, page A41). While still refusing to grant Ms. Wyatt her licenses or a fair hearing, Catherine Phillips and Hank Jordan of DHR wrote to John Tyson, Jr. and to various agencies, to attempt to have Ms. Wyatt prosecuted for operating without a license and unpaid for her services. In November 6, 1998, Mary Wyatt filed suit in

the Circuit Court of Mobile County, Alabama, seeking injunctive relief to prevent the Department of Human Resources from taking her day care licenses without the due process of a fair hearing. The Honorable Robert G. Kendall granted the Plaintiff's motion for an injunction preventing the revocation of her licenses on December 4, 1998, but the Department of Human Resources continued to refuse Ms. Wyatt a fair hearing.

In April of 1999, the Circuit Court case was dismissed without prejudice, the Department of Human Resources having granted Ms. Wyatt her daytime license, and been forced to allow Mary Wyatt a fair hearing on the denial of her nighttime license.

As the result of the denial of her right to a fair hearing, Mary Wyatt suffered financial losses.

Catherine Phillips, Erin Wheeler, and the Mobile County Department of Human Resources caused Mary Wyatt not to be paid and reported her to the Mobile County District Attorney's Office for prosecution while she was awaiting her fair hearing, in violation of their own procedures (Appendix G, page A41).

Following a hearing held on October 26 and 27, 1999, the Honorable William Prendergast found in favor of Mary Wyatt in every issue presented, and Ordered that Ms. Wyatt's nighttime license be issued (Appendix A, page A26). The Defendants did not appeal this ruling.

Ms. Wyatt filed the present case in the Circuit Court of Mobile County, Alabama on February 10, 2000, naming the Mobile County Department of Human

Resources, Erin Wheeler, individually and as head of Mobile County Department of Human Resources, and Catherine Phillips, individually, and in her capacity as an employee of Mobile County Department of Human Resources, as Defendants. This Circuit Court case was assigned to the Honorable Herman Thomas. On April 8, 2000, the Defendants filed a motion to dismiss the Plaintiff's Complaint. After a hearing on the motion to dismiss, the Court denied the Defendants' motion on May 23, 2000 (Appendix B, page A29). The Defendants then filed a motion to reconsider. In this motion to reconsider, the Defendants ask the Court to reconsider only those claims against the Department of Human Resources, and not those against Catherine Phillips and Erin Wheeler. The Court denied the motion to reconsider on July 24, 2000 (Appendix C, page A30). The Defendants then petitioned for a writ of mandamus from the Court of Civil Appeals of the State of Alabama. That petition was denied on August 22, 2000, (Appendix D, page A31). The Defendants then petitioned for a writ of mandamus from the Supreme Court of the State of Alabama. The writ of mandamus was granted as to the Department of Human Resources and Catherine Phillips and Erin Wheeler in their official capacities, and Denied as to Catherine Phillips and Erin Wheeler in their individual capacities (Appendix E, page A32).

A timely filed petition for Rehearing by Mary Wyatt was denied on September 7, 2001. Ms. Wyatt now appeals to the Supreme Court of the United States of America.

Reasons for Granting the Petition

Because of sovereign immunity, State agencies have great power over the citizens of their States. .It is essential to an ordered society that a citizen knows that if he passes a written and road test he may drive, that he may register to vote and then exercise that privilege, and that the low bidder on a government contract will be awarded that project. The United States Constitution forbids the taking of a right without due process of law.

It is both dangerous and against public policy to allow state agencies to violate their own policies with impunity. Procedural due process violations are among the rare instances in which sovereign immunity is not absolute. Mary Wyatt was denied a fair hearing because DHR violated its own policies. That DHR was later forced to follow its own policies does not mean that Mary Wyatt's procedural due process rights were not violated.

The Alabama Supreme Court, in relying on the Bowman v. Alabama Department of Human Resources, 857 F.Supp.1524 (M.D.Ala.1994) case, ignored any procedural due process violations by DHR, because Ms. Wyatt was eventually able to sue out of DHR that which was her procedural right: a fair hearing. The Bowman case addresses substantive due process, not an absolute right, but the Alabama Supreme Court finds substantive and procedural due process violations to be equal, an error.

In the Bowman case, that Court specifically finds that, because the Bowmans were timely given a fair hearing, the procedural remedy made available to them by the State, their due process rights were not violated. However, Mary Wyatt was denied a fair hearing. She

had togo to the Mobile County Circuit Court, which forced DHR to grant her a fair hearing. In Bowman, that Court finds that if the Bowmans had been denied a fair hearing, their procedural due process rights would have been violated. That is exactly what happened in our case: Ms. Wyatt's procedural due process rights under the 14th Amendment were violated by DHR's persistent denial of a fair hearing. That she was later able to get the Mobile County Circuit Court to force DHR to give her a fair hearing does not mitigate the staggering losses she suffered while suing, because of DHR's failure to follow its own procedures, nor should it absolve DHR's responsibility for those losses. She was denied a fair hearing, and Bowman says that denial constitutes a denial of her procedural due process rights.

Bowman does say that a fair hearing can be post-revocation of a day care license, but cannot be refused. That Ms. Wyatt was able to sue in Mobile County Circuit Court, then obtain a fair hearing, does not vitiate DHR's refusal of that hearing. Under Bowman, DHR violated Mary Wyatt's procedural due process rights under the 14th Amendment to the United States Constitution.

Conclusion

For the foregoing reasons, the petition should be granted.

Ellen T. Turner

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"Appendix-A"

BEFORE THE STATE OF ALABAMA
DEPARTMENT OF HUMAN RESOURCES

Mobile County

IN RE: MARY WYATT DENIAL OF APPLICATION FOR NIGHTTIME HOME LICENSE HEARING

FINAL DECISION

Under date of April 1, 1999, the Mobile County Department of Human Resources (hereinafter referred to as the Department or DHR) notified Ms. Mary Wyatt that her application for a family nighttime home license had been denied. Ms. Wyatt was further notified that she was entitled to a fair hearing regarding this decision and Ms. Wyatt duly requested an administrative hearing. The Administrative Hearings Office later transmitted to Ms. Ellen Turner, attorney for Ms. Wyatt and to Mr. G. Wayne Ash bee, attorney for the Mobile County Department of Human Resources, notice of the date, time and place of the hearing and a copy of the procedures for pre-revocation/fair hearings.

The hearing was conducted on October 26, and October 27, 1999, at the offices of the Mobile County Department of Human Resources. Mr. G. Wayne Ash bee represented the Department at said hearing. . Ms. Ellen Turner represented Ms. Wyatt. Jurisdiction: The legal authority and jurisdiction for this fair hearing is *Ala. Code 1975,* § 38-7-1 *et seq.* and § 41-22-1 *et seq.,* and the Alabama Department of Human Resources' *Administrative Code,* Chapters 660-1-5 and 660-5-25.

STATEMENT OF THE ISSUES

The issues, as framed by the County Department are as follows: Minimum Standards Section III, H, 7, provides that no person shall hold a license for Day Care Home and a license for Nighttime Home simultaneously without special permission from the County Department. Family and Children's Services Manual Chapter X, IV, F, (1), (b), (d), (f), states that particular consideration needs to be given to the availability of other adults or older teenagers to assist with some of the specific responsibilities and the number of the continuous hours of care.

A) Ms. Wyatt's husband, Walter Wyatt, is listed as the only other household member. According to Mr. Wyatt, he works 12 hours a day, 6 days a week, has no specific responsibilities and does not participate in the care of the children in Ms. Wyatt's home.

B) Solely Ms. Wyatt provides the number of continuous hours of care, that is 24 hours a day, 7 days a week.

1. On May 29. 1998, Ms. Wyatt indicated she was providing 24-hour care for 17 children. This included 5 daytime children, 3 part-time children, 5 nighttime children and 4 children who came for overnight care and received their regular night's sleep

2. During the investigation on July 13, 1998, it was determined that Ms. Wyatt was providing 24-hour care for as many as 25 children reportedly in hour shifts, including three children who attended on weekends. During the investigation on July 13, 1998, Ms. Wyatt gave verbal times for children's attendance as 6 children from 6:30 a.m. to 12:30 p.m.; 6 children from 12:00 noon to 6:00 p.m.; 6 children from 6:00 p.m. to 12:00 midnight and 6 children from 12:30 a.m. to 6:00 a.m.

3. During the investigation on February 23, 1999, Ms. Wyatt reported operating for 24-hour days and 7 days a week. According to Mr. Wyatt, in an interview in Ms. Wyatt's home on March 17, 1999, he works 12 hours a day, 6 days a week, has no specific responsibilities and does not participate in the care of the children in the home.

C. Minimum Standards Section III, B, 9 provides that the home shall have space for providing privacy to a child in care and to the members of the operator's household as needed, whether for resting, studying or other purposes.

1. The investigation revealed that there is inadequate space for privacy for Ms. Wyatt's family. Ms. Wyatt's husband stated that he sleeps in the master bedroom that his clothes are stored in a closet in the first bedroom and he uses the hall bathroom for dressing between 5:30 a.m. and 6:30 a.m. The space used by the nighttime children for their regular night's sleep includes two of Ms. Wyatt's three bedrooms. Ms. Wyatt indicated that the departure time for the four children currently in nighttime care is between 6:00_a.m. and 7:00 a.m. and the other daytime children arrive between 6:00 a.m. and 8:00 a.m. Therefore, neither Mr. Wyatt nor the children have adequate privacy.

2. Family and Children's Services Manual Chapter X, IV, F, (1), provides that recording of the home evaluation for licensing and re-licensing home to provide two kinds of care simultaneously must be done in such a way as to document separately each type of services. There is not sufficient documentation to show separately each type of services for children coming into the home for care.

D) Ms. Wyatt provided documentation of children's attendance through forms used with participation with the Dumas Wesley Food Service Program. Reports to the Department and reports submitted to Dumas Wesley Food Service Program regarding the meals fed and the Attendance Reports submitted to Gulf Regional Child Care Management Agency regarding the number of hours children were in care and did not agree.

1. Ms. Wyatt's handwritten list of children attending, provided to the Department on May 29, 1998, and indicated that Raven, Amanda, Brandon and Brianna attended from 11:00 p.m. to 6:30 or 7:00 a.m. During the investigation on July 13, 1998, Ms. Wyatt indicated these children attended from 12:00 noon to 6:00 p.m., during the months of June and July. However, Ms. Wyatt's feeding reports showed that these children were in attendance for supper and bedtime snack during the months of May, June and July Ms. Wyatt reported to Gulf Regional the number of hours of attendance as being eight hours.

2. Ms. Wyatt's handwritten list of children attending, provided to the Department on May 29, 1998, and indicated those four siblings, Terry. Quantavi, Quantavious and Wesley were enrolled for day time care from 7:00 a.m. to 3:00 p.m., and served breakfast, snack and lunch. During the July 13, 1998 investigation, Ms. Wyatt gave verbal times of arrival and departure times on record were 6:30 a.m. to 2:30 or 3:00 p.m. On the June feedings reports, the other sibling, Mercedes, was reported as being enrolled for nighttime care and received supper and bedtime snack

3. Ms. Wyatt's handwritten list of children attending, provided to the Department on May 29, 1998, indicated that one child, Mercedes, comes from 3:20 p.m. to 4:30 p.m. However, Ms. Sylvia Boggan, the parent of the five siblings, indicated that her work hours were from 6:00 a.m. to 2:00 p.m. and Mercedes did not attend the home during the month of May, unless school was out. On the July report Mercedes' name was moved to the daytime count and another child Keith, was listed.

4. On May 29, 1998, Ms. Wyatt indicated that Keith came from 7:00 a.m. to 3:00 p.m. On the July report Keith was shown as being served supper and bedtime snack. This child's record indicated that the arrival/departure times were from 9:00 a.m. to 3:30 p.m,

5. Ms Wyatt's handwritten list of children attending provided to the Department on May 29, 1998, indicated two children, Isiah and Evelyn, attended from 5:00 p.m. to 10:30 p.m. During the investigation on July 13, 1998, Ms. Wyatt indicated that these children attended from 12:00 noon to 6:00 p.m. The arrival and departure time recorded in the children's record indicated 3:00 p.m. to 10:30 p.m.

6. During December 1998 Mercedes was not included on feeding reports but attended on five days for seven hours. In January 1999, the child's hours of attendance were 2 1/2 hours daily but were not included on the feeding report.

7. During December 1998, the feeding reports showed that two children, Evelyn and Isiah, were served and bedtime snack. Their record indicated times of arrival/departure as being from 3:00 p.m. to 6:30 p.m. The

attendance report indicates children were in attendance an average of 5 1/2 to 6 hours.

8. One child, Alicia, was reported as receiving snack and supper for the months of December 1998 and January 1999 but was enrolled from 10:00 p.m. to 7:00 a.m. with three other siblings.

9. Minimum Standards Section III, E, 4, states that the Character and Suitability of a license/permit holder, staff member, or applicant for employment, in a paid or voluntary position, to hold a license for six month permit or to work in a child care facility may also be assessed by a review of the past history of the individual regarding their truthfulness and their ability to care for children. False or misleading statements made by the individual to the Department are considered as evidence of unsuitable character.

A. *Further investigation reveals that Ms. Wyatt and Mr. Wyatt appear to have made false and misleading statements to the Departments during the examination and inspection of Ms. Wyatt's home.*

1. Ms. Wyatt's application dated March 25, 1998, which was submitted to the Department's representative on May 29, 1998, include Ms. Wyatt's spouse, Walter Wyatt, as a household member. During the interview with Mr. Wyatt, he stated that their relationship was fine. The time spent together includes Sundays, his only day off, when he and Ms. Wyatt would go to church, dinner, movies or special events. Mr. Wyatt indicated his normal routine when returning home from work included showering, watching television in the den or back bedroom or reading and retiring to bed around 9:00 to 9:30 p.m.

2. According to records in Mobile County Probate Court, Ms. Wyatt and Walter Wyatt were divorced on July 7, 1995. According to Ms. Wyatt's employer and current vehicle registration, Mr. Wyatt's current address is reported as 201 Ingate Street, Mobile, Alabama 36607.

B. In assessing Character and Suitability by a review of the past history and ability to care for children, the investigation revealed that childcare services were not made available for parents during their normal work hours. Ms. Wyatt indicated that she would work the arrival and departure times by requiring parents to either come early or transport children depending on the children in her care at any given time to only have six children in the house.

1. On May 29, 1998, Ms. Wyatt identified four siblings, Raven, Amanda, Brandon and Brianna as coming from 11:00 p.m. to 7:00 a.m. During the July investigation Ms. Wyatt indicated these children came from 6:00 p.m. to 12:00 midnight. According to Ms. Meoshi Nelson, the parent of the children, her work hours for May, June and July were from 3:00 p.m. to 11:30 p.m.

2. On May 29, 1998, Ms. Wyatt identified five children, Terry. Quantavi, Quantavious, Wesley and Mercedes as attending day care from 7.00 a.m. to 3:00 p.m. During the July investigation Ms. Wyatt indicated these children came from 6:00 p.m. to 12:00 noon. According to Ms. Sylvia Boggan the parent of the children, she worked from 6:00 a.m. to

3. On May 29, 1998, Ms. Wyatt identified two children, Isiah and Evelyn, as attending day care from

5:00p.m. to 10:30p.m. During the July investigation Ms. Wyatt indicated these children came from 12:00 noon to 6:00 p.m. According to Ms. Christine Powell, the parent of the children, she worked 2:00 p.m. to 9:00 p.m. for the months of May, June and July. She also had a days work job from 8:00 a.m. to 3:00_p.m. when she was available.

4. Minimum Standards Section III, E. 5, states that applicants for a license and holders of licenses/six-month permits who are discovered to have had a history of operating without a license and refusal to- cease operations are considered as evidence of unsuitable character.

A) Ms. Wyatt was notified in the letter dated April 1, 1999, that she was not licensed to provide care for children after 2:00 p.m. On May 5, 1999, report was received from Ms. Wyatt indicating four children in care past 7:00 p.m. with four more arriving after 9:30 p.m. for overnight care.

B) On May 10, 1999, Ms. Wyatt's unlicensed status for nighttime care was reported to the District Attorney's office for operating an unlicensed home.

C) On June 8, 1999, a monthly report was received from Ms. Wyatt for the month of May indicating 2 children in care past 7:00 p.m., with 4 more arriving after 9:30 p.m.

D) On July 7, 1999, Ms. Wyatt submitted monthly reports and daily attendance report forms for the month of June, which indicated 2 children in care past 7:00 p.m., with four more arriving after 9:30 p.m. The Department concluded, based on the findings 1-4 above, that the application should be denied.

FINDINGS OF FACT

Chronology of Events

Ms. Mary Wyatt was first licensed by the Department of Human Resources to operate a family day care home located at 514 Newport Drive East, Mobile, Alabama on February 14, 1992. On August 11, 1994 Ms. Wyatt called her licensing worker regarding her to be licensed for a family nighttime care home. Ms. Wyatt was informed by the licensing worker that effective on that date she was granted a nighttime license for six children, age infant to fourteen years. The record reflects that Ms. Wyatt was granted the license "due to the need expressed by parents and Ms. Wyatt has a history of maintaining minimum standards."

The record further reflects that Ms. Wyatt was issued a certificate of licensure for her nighttime license (#170885) on February_14, 1996, said license to expire on February 14, 1998, which coincides with the expiration of her day-care license.

The practice in Mobile County for the renewal of a day-time care/nighttime care license changed in 1997 up until that time the application for renewal would be mailed to the licensee who would complete the application. The license worker would then pick up the license package when she visited the daycare home for the renewal in-spection. In 1997 that practice was changed due to staff shortages at the Mobile County Department of Human Resources. As part of the new practice a letter was to be sent to the licensee notifying the licensee that due to serious reductions in staff the licensee would have to

complete a self evaluation-application form and return it to the agency at least thirty days prior to the expirationof the license. These forms should have been mailed to the licensee approximately sixty days prior to the expiration of the license. However, from the evidence presented I find that Ms. Wyatt did not receive her letter and packet until March of 1998, which was after the February 14, 1998 expiration of her day and nighttime licenses. This letter stated in part that "we will attempt to renew all licenses as soon as possible, however we are aware that some of your licenses will expire before we have the opportunity to visit your facility." Ms. Wyatt did not mail the completed license package back to the Department. On May 29, 1998 the licensing worker went to Ms. Wyatt's home to inspect the home for .renewal of the daytime and nighttime licenses At that time the worker picked up the license forms from Ms. Wyatt, inspected the premises and filled out deficiency report of items that needed to be corrected in the home. In early July 1998 the licensing worker received a report regarding too many children appearing on Ms. Wyatt's rolls from the entity that paid the childcare subsidies for Ms. Wyatt's home. On July 13, 1998 the worker visited Ms. Wyatt in her home, discussed the report with her and picked up records regarding children in care. The worker then did an extensive review of the records provided by Ms. Wyatt as well as a review of the records provided by the entities that processed the food and child care subsidies. This review showed inconsistencies in the records, but did not show that Ms. Wyatt was at any time keeping more children than she was licensed to keep. Additionally, no representative of the Department at any time ever observed Ms. Wyatt caring for more than her licensed capacity. On July 23 1998 the licensing worker wrote Ms. Wyatt a f ollow up letter

letter pointing out perceived deficiencies and stating that Ms. Wyatt was not maintaining daytime requirements and I could not recommend that the nighttime license be renewed". Ms. Wyatt was further notified in this letter that she was entitled to a fair hearing as a result of this adverse action. Ms. Wyatt then requested a fair hearing. Ms. Wyatt was then notified by the Department in a letter dated October 16, 1998 that because her daytime and nighttime licenses had expired prior to the submission of her application for renewal, no fair hearing would be available to her. Rather, she was notified that her application was being treated as a new application, not a renewal. Subsequent to this notification, Ms. Wyatt filed suit in the Circuit Court of Mobile County regarding the status of her licenses. On February 3, 1999 another licensing inspection took place at Ms. Wyatt's home. In response to complaints by Ms. Wyatt that she was not being treated fairly a licensing social worker from the County Department of Human Resources, at the request of the Mobile County Department of Human Resources, accompanied the Mobile County licensing social worker to the Wyatt home. The purpose of the Baldwin County social workers presence was to offer an unbiased outside opinion regarding the inspection of the home. The Baldwin County social worker took the lead in this inspection and noted certain correctable deficiencies in the home which Ms. Wyatt expressed an immediate willingness to correct. No significant health or safety issues were noted and the Baldwin County social worker recommended relicensing of the Wyatt home if the deficiencies were corrected. In a writing dated March 2, 1999 the Department agreed to extend Ms. Wyatt's daytime and nighttime licenses until March 31.1999 to allow her time to comply with the minimum standards. No statutory or regulatory authority

was offered by the Department to support this administrative decision to extend Ms. Wyatt's licenses.) In the March 2, 1999 letter to Ms. Wyatt notifying her of this decision she was also notified that "the issue was unclear as to whether you were receiving an initial inspection or a renewal inspection with reference to the requirement for new medical information. Our files reflect that your medical record was completed on January 23, 1996, and your husbands and sons medicals on August 25, 1995. They would be considered current for a renewal inspection we are making an administrative decision to accept the medicals as current." The record further reflects that the Mobile County Department of Human Resources licensure social worker recommended that Ms. Wyatt be issued a full daytime care license and that issued on a restricted basis However, the recommendations of the Baldwin County and Mobile County social workers regarding the nighttime license were overruled by the Mobile County Director By letter dated April 1, 1999, Ms. Wyatt was notified that her application to operate a famiIy daycare home was granted and she was further notified that her application to operate a family was denied. Ms. Wyatt requested a hearing regarding this denial. Ms. Wyatt also continued to provide nighttime care after this denial up until the time of the hearing. With regards to the children in nighttime care, Ms. Wyatt filed monthly - reports with the Department of Human Resources regarding her services.

Basis for Denial

The reasons for the denial of Ms. Wyatt's nighttime license are set out in a six page letter to Ms. Wyatt dated July 28, 1999. These reasons are divided by the Department into four primary categories, ten secondary cate-

gories, and eighteen sub categories. For ease of analysis these reasons will be dealt with separately.

Issue

1. Minimum Standards Section III, H, 7, provides that no person shall hold a license for Day Care Home and a license for Nighttime Home simultaneously without special permission from the County Department. Family and Children's Services Manual Chapter X, IV, F, (1), (b), (d), (f), states that particular consideration needs to be given to the availability of other adults or older teenagers to assist with some of the specific responsibilities and the number of the continuous hours of care.

A) Ms. Wyatt's husband, Walter Wyatt, is listed as the only other household member. According to Mr. Wyatt, he works 12 hours a day, 6 days a week, has no specific responsibilities and does not participate in the care of the children in Ms. Wyatt's home.

B) Solely Ms. Wyatt provides the number of continuous hours of care, that is 24 hours a day, 7 days a week.

1. On May 29, 1998, Ms. Wyatt indicated she was providing 24-hour care for 17 children. This included 5 daytime children, 3 part-time children, 5 nighttime children and 4 children who came for overnight care and received their regular night's sleep.

2. During the investigation on July 13, 1998, it was determined that Ms. Wyatt was providing 24-hour care for as many as 25 children reportedly in 6 hour shifts,

including three children who attended on weekends.

3. During the investigation on July 13, 1998, Ms. Wyatt gave verbal times for children's attendance as six children from 6:30 a.m. to 12:30 p.m.; six children from 12:00 noon to 6:00 p.m.; 6 children from 6:00 p.m. to 12:00 midnight and six children from 12:30 a.m. to 6:00 a.m.

4. During the investigation on February 23, 1999, Ms. Wyatt reported operating for 24-hour days and 7 days a week. According to Mr. Wyatt, in an interview in Ms. Wyatt's home on March 17, 1999, he works 12 hours a day, 6 days a week, has no specific responsibilities and does not participate in the care of the children in the home.

Findings

The evidence established that the presence of other adults or older teenagers in the home is not a requirement for a nighttime license, but is rather a consideration to be taken into account by the county Department. The evidence further established that there are, in Mobile County, a number of nighttime homes licensed by the Department wherein the licensee is the only adult residing in the home. Additionally, Ms. Wyatt testified that she could make arrangements for another adult to be in the home if such was necessary. Further, the Baldwin County social worker who was brought into Mobile to conduct an impartial review of the Wyatt home testified that it was her recommendation that a nighttime license be issued to Ms. Wyatt to keep the four children sibling group that she had been keeping for five days a week. This was also the recommendation of the Mobile County Department of Human Resources Social Worker who was assigned to

However, their recommendations were overruled by higher department officials and no nighttime license was issued.

A stated concern of the Department was the potential negative impact that being licensed for twenty-four hour care, seven days a week could have on Ms. Wyatt. However no evidence whatsoever was introduced which would establish or even tend to indicate that keeping children had any negative impact upon Ms. Wyatt's physical or mental health. To the contrary, Ms. Wyatt testified that providing day and nighttime childcare was no drain on her physical or mental health and that she had a qualified substitute available to assist if necessary. She further testified that she would even take the children on outings when they were not in her paid care because she loved the children and loved being with them.

I do not find that the fact that there are no other adults or older teenagers in the Wyatt home to be an adequate basis for the denial of her nighttime license. Rather, the evidence established that Ms. Wyatt was capable of properly providing nighttime care, and she had done so for a period of time without problem.

Issue

C) Minimum Standards Section III, B, 9 provides that the home shall have space for providing privacy to a child in care and to the members of the operator's household as needed, whether for resting, studying or other purposes.

1. The investigation revealed that there is inadequate space for privacy for Ms. Wyatt's family. Ms. Wyatt's husband stated that he sleeps in the master bedr

room and he uses the hall bathroom for dressing between 5:30 a.m. and 6:30 a.m. The space used by the nighttime children for their regular night's sleep includes two of Ms. Wyatt's three bedrooms. Ms. Wyatt indicated that the departure time for the four children currently in nighttime care is between 6:00 a.m. and 7:00 p.m. and the other daytime children arrive between 6:00 a.m. and 8:00 a.m. Therefore, neither Mr. Wyatt nor the children have adequate privacy.

Findings

This basis for the denial of Ms. Wyatt's nighttime license centers on privacy concerns. However, the Baldwin County Social Worker (referenced above) testified that she was satisfied with Ms. Wyatt's proposed solutions to the privacy concerns, which were offered by Ms. Wyatt on the date of the home inspection. Additionally, Mr. Wyatt after being made aware that his presence in the home raised privacy issues ceased staying in the home, thus mooting any privacy issues based upon his presence there. I find that all privacy issues have been resolved and therefore do not serve as a legitimate basis for the denial of the nighttime care license.

Issue

2. Family and Children's Services Manual Chapter X, IV, F, (1), provides that recording of the home evaluation for licensing and re-licensing home to provide two kinds of care simultaneously must be done in such a way as to document separately each type of services. There is not sufficient documentation to show separately each type of services for children coming into the home for care.

A)Ms. Wyatt provided documentation of children's attendance through forms used with participation with the Dumas Wesley Food Service Program. Reports to the Department and reports submitted to Dumas Wesley Food Service Program regarding the meals fed and the Attendance Reports submitted to Gulf Regional Child Care Management Agency regarding the number of hours children were in care and did not agree.

1. Ms. Wyatt's handwritten list of children attending, provided to the Department on May 29, 1998, and indicated that Raven, Amanda, Brandon and Brianna attended from 11:00 p.m. to 6:30 or 7:00 a.m. During the investigation on July 13, 1998, Ms. Wyatt indicated these children attended from 12:00 noon to 6:00 p.m., during the months of June and July. However, Ms. Wyatt's feeding reports showed that these children were in attendance for supper and bedtime snack during the months of May, June and July. Ms. Wyatt reported to Gulf Regional the number of hours of attendance as being eight hours.

2. Ms. Wyatt's handwritten list of children attending, provided to the Department on May 29, 1998, indicated that four siblings, Terry, Quantavi, Quantavious and Wesley were enrolled for day time care from 7:00 p.m. to 3:00 p.m., and served breakfast, snack and lunch. During the July 13, 1998 investigation, Ms. Wyatt gave verbal times of arrival and departure times on record were 6:30 p.m. to 2:30 or 3:00 p.m. On the June feedings reports, the other sibling, Mercedes, was reported as being enrolled for nighttime care and received supper and bedtime snack.

3. Ms. Wyatt's handwritten list of children

attending, provided to the Department on May 29, 1998, indicated that one child, Mercedes, comes from 3:20 p.m. to 4:30 p.m. However, Ms. Sylvia Boggan, the parent of the five siblings, indicated that her work hours were from 6:00 p.m. to 2:00 p.m. and Mercedes did not attend the home during the month of May, unless school was out. On the July report Mercedes' name was moved to he daytime count and another child Keith, was listed.

4. On May 29, 1998, Ms. Wyatt indicated that Keith came from 7:00 a.m. to 3:00 p.m. On the July report Keith was shown as being served supper and bedtime snack. This child's record indicated that the arrival/departure times were from 9:00 a.m. to 3:30 p.m.

5. Ms Wyatt's handwritten list of children attending, provided to the Department on May 29, 1998, and indicated two children, Isiah and Evelyn, attended from 5:00 p.m. to 10:30 p.m.During the investigation on July 13, 1998, Ms. Wyatt indicated that these children attended from 12:00 noon to 6:00 p.m. The arrival and departure time recorded in the children's record indicated 3:00 p.m. to 10:30 p.m.

6. During December 1998 Mercedes was not included on feeding reports but attended on five days for seven hours. In January 1999, the child's hours of attendance were 2 1/2 hours daily but were not included on the feeding report.

7. During December 1998, the feeding reports showed those two children, Evelyn and Isiah, were served supper and bedtime snack. Their record indicated

times of arrival/departure as being from 3:30 p.m. to 6:30 p.m. The attendance report indicates children were in attendance an average of 5 1/2 to 6 hours.

8. One child, Alicia, was reported as receiving snack and supper for the months of December 1998 and January 1999, but was enrolled from 10:00 p.m. to 7:00 a.m. with three other siblings.

Findings

This reason for denial is based upon insufficient documentation to show separately each type of service for children coming into the home for care. This requirement applies equally to licensure for daycare and nighttime care. The alleged inconsistencies in record keeping that form the basis for the denial of the nighttime license are not focused upon record keeping for the nighttime license, but rather address record keeping concerning children in both day and nighttime care. However, it was the testimony of the licensing Social Worker that this alleged violation was not relevant or considered in the determination to issue the daycare license. The inconsistencies stem from different records which are required to be kept for the agencies that provided food and care subsidies as well as from Ms. Wyatt's own records. However, there was not any showing that Ms. Wyatt ever had more than her licensed capacity of six children in are at one time.

While the records do not agree in all facets there is not any showing of wrong doing on Ms. Wyatt's part and she has implemented corrective action regarding her record keeping. I do not find that these inconsistencies form an adequate basis for the denial of the nighttime license.

keeping. I do not find that these inconsistencies form an adequate basis for the denial of the nighttime license.

Issue

3. Minimum Standards Section III, E, 4, states that the Character and Suitability of a license/permit holder, staff member, or applicant for employment, in a paid or voluntary position, to hold a license for six month permit or to work in a child care facility may also be assessed by a review of the past history of the individual regarding their truthfulness and their ability to care for children. False or misleading statements made by the individual to the Department are considered as evidence of unsuitable character.

A) Further investigation reveals that Ms. Wyatt and Mr. Wyatt appear to have made false and misleading statements to the Department during the examination and inspection of Ms. Wyatt's home.

1. Ms. Wyatt's application dated March 25, 1998, which was submitted to the Department's representative on May 29, 1998, include Ms. Wyatt's spouse, Walter Wyatt, as a household member. During the interview with Mr. Wyatt, he stated that their relationship was fine. The time spent together includes Sundays, his only day off, when he and Ms. Wyatt would go to church, dinner, movies or special events. Mr. Wyatt indicated his normal routine when returning home from work included showering, watching television in the den or back bedroom or reading and retiring to bed around 9:00 to 9:30 p.m.

2. According to records in Mobile County Probate Court, Ms. Wyatt and Walter Wyatt ere divorced on

July 7, 1995. According to Ms. Wyatt's employer and current vehicle registration, Mr. Wyatt'scurrent address is reported as 201 Ingate Street, Mobile, Alabama 36607.

Findings

Mr. and Mrs. Wyatt were divorced in 1995. However after their divorce they considered remarrying, they co-habituated several nights a week and Mr. Wyatt kept some clothes at Ms. Wyatt's home and received some of his mail there. According to the testimony of Ms. Wyatt she informed her prior licensing social worker of this fact and that social worker raised no Issues regarding this matter and even provided medical forms for Mr. Wyatt to complete. Likewise, the Baldwin County social worker testified that if a divorced couple considered themselves as married or. were on a trial reconciliation it would have no relevance to the licensure procedure. She further testified that if a couple were divorced but did not stop living together there would be no need to notify the Department of Human Resources regarding the divorce. Likewise, she testified that the designation of an ex-husband or ex-wife as a spouse was not uncommon.

Both Mr. and Ms. Wyatt testified that they still cared very much for each other. It was also their testimony that until the time when Mr. Wyatt moved totally out of Ms. Wyatt's home in order to satisfy the Departments privacy concerns they would spend several nights a week together at Ms. Wyatt's home.

Because of the ambiguous nature of the Wyatt's relationship I do not find that Ms. Wyatt listing Mr. Wyatt as her spouse, particularly in light of having made full disclo-

sure to her prior licensing social worker, to be a false or misleading statement that would be evidence of unsuitable character for licensure purposes.

Issue

B) In assessing Character and Suitability by a review of the past history and ability to care for children, the investigation revealed that childcare services were not made available for parents during their normal work hours. Ms. Wyatt indicated that she would work the arrival and departure times by requiring parents to either come early or transport children depending on the children in her care at any given time to only have six children in the house.

1. On May 29, 1998, Ms. Wyatt identified four siblings, Raven, Amanda, Brandon and Brianna as coming from 11:00 p.m. to 7:00 a.m. During the July investigation Ms. Wyatt indicated these children came from 6:00 p.m. to 12:00 midnight. According to Ms. Meoshi Nelson, the parent of the children, her work hours for May, June and July were from 3:00 p.m. to 11:30 p.m.

2. On May 29, 1998, Ms. Wyatt identified five children, Terry, Quantavi, Quantavious, Wesley and Mercedes as attending day care from 7:00 a.m. to 3:00 p.m. During the July investigation Ms. Wyatt indicated these children came from 6:00 a.m. to 12:00 noon. According to Ms. Sylvia Boggan the parent of the children, she worked from 6:00 a.m. to 2:00 p.m.

3. On May 29, 1998, Ms. Wyatt identified two children, Isiah and Evelyn, as attending day care from

to 10:30 p.m. During the July investigation Ms. Wyatt indicated these children came from 12:00 noon to 6:00 p.m. According to Ms. Christine Powell, the parent of the children, she worked 2:00 p.m. to 9:00 p.m. for the months of May, June and July. She also had a days work job from 8:00 a.m. to 3:00 p.m. when she was available.

Findings

This basis for denial is an assessment of Ms. Wyatt's character and suitability based upon a review of her past childcare history and of her ability to care for children. None of the evidence presented indicated that Ms. Wyatt was unable to properly care for children. The Departments review of the records indicated that services were not made available for parents during their normal work hours. However, as set out above, those records were prepared for different reasons to be submitted to different entities under different guidelines.

The testimony presented by parents at the hearing indicated that Ms. Wyatt was an excellent caretaker who provided appropriate care to meet their needs. Some of the inconsistencies noted in the Departments analysis stem from parents work schedules changing and from the need for different child care schedules due to school being in recess. I do not find these purported deficiencies to be an adequate basis for the denial of the nighttime license.

Issue

4. Minimum Standards Section III, E. 5, states that applicants for a license and holders of licenses/six-month permits who are discovered to have had a history

of operating without a license and refusal to cease operations are considered as evidence of unsuitable character.

A) Ms. Wyatt was notified in the letter dated April 1, 1999, that she was not licensed to provide care for children after 7:00 p.m. On May 5, 1999, a monthly report was received from Ms. Wyatt indicating four children in care past 7:00 p.m. with four more arriving after 9:30 p.m. for overnight care.

B) On May 10, 1999, Ms. Wyatt's unlicensed status for nighttime care was reported to the District Attorney's office for operating an unlicensed home.

C) On June 8, 1999, a monthly report was received from Ms. Wyatt for the month of May indicating 2 children in care past 7:00 p.m., with 4 more arriving after 9:30 p.m.

D) On July 7, 1999, Ms. Wyatt submitted monthly reports an daily attendance report forms for the month of June which indicated 2 children in care past 7:00 p.m., with four more arriving after 9:30 p.m.

Findings

This basis for denial stems from the fact that Ms. Wyatt continue to provide nighttime care to children after receiving notification on April 1, 1999, that her license had been denied. Whether or not Ms. Wyatt continuing to keep children at night is in violation of licensure law and regulations depends upon whether or not she was deniedthe renewal of an existing license or was denied a new license application. As stated by the Departments

social worker, if Ms. Wyatt was appealing the denial of a license renewal, then she would be entitled to keep children during the appeal process.

Ms. Wyatt's license expired by its own terms in February of 1998. However, she did not receive instructions regarding new licensing procedures or the packet for new licensing procedures until March of 1998. In May of 1998 the Department's social worker went to Ms. Wyatt's home to process her application as a renewal. In July of 1998 Ms. Wyatt was notified that the licensing worker could not recommend that her nighttime license be renewed and Ms. Wyatt was notified of her right for a fair hearing to contest said decision.

After attempting to assert her right to a fair hearing Ms. Wyatt was notified on October 16. 1998 that because her license had expired prior to the submission of her application for renewal she was not entitled to a fair hearing but would rather have to submit a new completed for a license prior to her application being acted upon. Then, on March 2, 1999 Ms. Wyatt was notified that the Department would "extend your current license until March 31, 1999." In this notification Ms. Wyatt was further informed that certain records that would not be considered as current in processing an application for but would be considered current in processing an application for a license renewal would be accepted as current by the Department.

It is undisputed that Ms. Wyatt continues to keep children at night. In fact Ms. Wyatt regularly submits reports to the Department concerning her nighttime care. The Department asserts that her continuing to keep children at

has been replete with inconsistent and contradictory positions and interpretations. In light of the fluid and continually changing manner in which her application was treated by the Department Ms. Wyatt, with the advice of her attorney, continued to care for children at night. She did so with full disclosure to the Department of her nighttime childcare activities and while attempting to pursue her appeal rights. Taking into account the totality of the circumstances, I do not find that Ms. Wyatt's keeping of children at night to be evidence of unsuitable character.

CONCLUSIONS OF LAW

The Department of Human Resources has the statutory authority to license child care facilities and further has the duty to develop and publish minimum standards for the licensing and approving of said child care facilities. Ala. Code 1975, § 38-7-1, et seq. Ala. Code 1975, § 38-7-7 provides as follows:

(a) The department shall prescribe and publish minimum standards for licensing and for approving all child-care facilities, as defined in this chapter. In establishing such standards the department shall seek the advice and assistance of persons representative of the various types of child care facilities.

Ala. Code 1975, § 38-7-8 further provides that the Department may revoke or refuse to renew the license or the approval of any child-care facility or refuse to issue a full license to the holding of a six-month permit should the license or the child-care facility designated on the notice

of approval or the holder of a six-month permit.

(1) Consistently fail to maintain standards prescribed and published by the department;

(2) Violate the provisions of the license issued;

(3) Furnish or make any misleading or any false statements or report to the department;

(4) Refuse to submit to the department any reports or refuse to make available to the department any records required by the department in making investigation of the child-care facility for licensing;

(5) Purposes; provided, however, that the department shall not revoke or refuse to renew a license in such case unless it has made written demand on the-person, firm or corporation operating the facility requesting such report or reports and such person, firm or corporation fails or refuses to submit such records for a period of 10 days; Fail or refuse to submit to an investigation by the department;

(6) Fail or refuse to admit authorized representatives of the department at any reasonable time for the purpose of investigation;

(7) Fail to provide, maintain, equip and keep in safe and sanitary condition premises established or used for child care as required under standards prescribed by the department, or as otherwise required by any law, regulation or ordinance applicable to such facility;

(8) Refuse to display its license or permit; or

(9) Fail to maintain financial resources adequate for the satisfactory care of children served in regard to upkeep of premises and provisions for personal care, medical services, clothing, learning experience and other essentials in the proper care, rearing and training of children. The rules, regulations, and procedures for operating child care facilities are set out in the Department's Minimum Standards for Family Day Care Homes and Nighttime Homes and are found in the Alabama Department of Human Resources' Administrative Code. Ala. Code 1975, § 37-7-11 provides that the Department of Human Resources has the duty and responsibility to determine whether in a child care facility there is any "condition, deficiency, dereliction or abuse Which is, or could be hazardous to the health, the safety or the physical, moral or mental well-being of the children in the care of the child-care facility being inspected..., and the department shall have the power to revoke with notice the license or approval or six-month permit of such child-care facility."

CONCLUSION

I find that the Mobile County Department of Human Resources did not prove by a preponderance of the evidence that Ms. Wyatt's application to operate a family nighttime home should have been denied.

Therefore, I reverse that decision and I direct that she be granted said license.

DONE this ____19__ day of November 1999.

s\William Prendergast
Administrative Hearing Officer

"Appendix-B"

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case Number CV 2000 411

Mary Wyatt
Plaintiff ,

vs.

Erin Wheeler, et al
Defendant,

ORDER

Defendants' Motion to Dismiss Complaint is denied.

Done this 23rd day of May, 2000.

s\ Herman Thomas
Herman Thomas, Circuit Court Judge

cc: Ellen Turner, Esquire
James Long, Esquire
Wayne Ashbee, Esquire

"Appendix-C"

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case Number CV 2000 411

Mazy Wyatt
Plaintiff,

VS.

Erin Wheeler, et al
Defendant,

ORDER

Defendants' Motion to reconsider its Order of May 23,2000 denying defendants Motion to Dismiss is denied.

Done this the 24th day of July 2000.

s\ Herman Thomas
Judge Herman Thomas

cc: Ellen Turner, Esquire
Wayne Ashbee, Esquire
James Long, Esquire

"Appendix-D"
August 22, 2000
THE COURT OF CIVIL APPEALS OF ALABAMA

RE: 2991248

Ex parte Mobile County Department of Human Resources, State of Alabama Department of Human Resources, Erin Wheeler, and Catherine Phillips PETITION FOR WRIT OF MANDAMUS (In re: Mary Wyatt v. Erin Wheeler, et al.) (Mobile County Circuit Court: CV 2000-411).

Petition for Writ of Mandamus, having been filed and the same having been submitted and duly examined and understood by the Court,

IT IS ORDERED that the petition be, and the same is hereby DENIED.

Robertson, P.J. and Monroe, Crawley and Thompson, JJ., concur.

John H. Wilkerson, Jr. Clerk of the Court of Civil Appeals of Alabama, do hereby certify the foregoing Is a full, true and correct copy of the instrument(s) herewith set out as same appears said court my hand this Of Stamp 2000

Clerk, Court of Civil Appeals of Alabama
SUPREME COURT OF ALABAMA

"Appendix-E"

NOTICE; This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue. Montgomery. Alabama 36104-3741 (334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA
OCTOBER TERM 2000-2001.

RE: 1992252

Ex parte Mobile County Department of Human Resources et al.

PETITION FOR WRIT OF MANDAMUS

(Re: Mary Wyatt

V.

Erin Wheeler et a]..)

(Mobile Circuit Court, CV-2000-411)

WOODALL, Justice.

This case arises out of the denial of Mary Wyatt's home care license renewal application by the Mobile County

Department of Human Resources ("Mobile DHR"). The Mobile DHR, the Alabama Department of Human Resources ("Alabama DHR") Erin Wheeler, and Catherine Phillips petition this Court for a writ of mandamus directing Hon. Herman Y. Thomas, Mobile County circuit judge, to 1) vacate or otherwise set aside his order denying their motion to dismiss Mary Wyatt's state and federal claims, and 2) enter an order dismissing her state and federal claims. Their motion to dismiss cited "the grounds of the absolute and qualified sovereign immunity of Defendants from suit in court." We grant the petition in part and deny it in part.

Mary Wyatt has been a licensed family day care provider since February 14, 1992. On February 14, 1996, Wyatt became a licensed nighttime care provider. Both of her licenses were valid for two year's, expiring on February 14, 1998. In 1997, Mobile DHR's practice for the renewal of a daytime care/nighttime care license changed. As a result, Wyatt did not receive her renewal application until after her licenses had expired.

Findings of fact made by William Prendergast, an administrative hearing officer, after conducting a "fair hearing" on the denial of Mrs. Wyatt's application for a nighttime license, explained:

"The practice in Mobile County for the renewal of a daytime care/nighttime care license changed in 1997. Up until that time the application for renewal would be mailed to the licensee who would complete theapplication. The license worker would then pick up the license package when the visited the daycare home for the

renewal inspection. "In 1997 that practice was changed due to staff shortages at the Mobile County Department of Human Resources. As part of the new practice, a letter was to be sent to the licensee notifying the licensee that due to serious reductions in staff the licensee would have to complete a self evaluation-application form and return it to the agency at least thirty days prior to the expiration of the license. These forms should have been mailed to the licensee approximately sixty days prior to the expiration of the license. However, from the evidence presented, I find that Ms. Wyatt did not receive her letter and packet until March of 1998, which was after the February 14, 2.998 expiration of her day and nighttime licenses. This letter stated in part that 'we will attempt to renew all licenses as soon as possible, however we are aware that some of your licenses will expire before we have the opportunity to visit your facility.' Ms. Wyatt did not mail the completed license package back to the Department."

DHR gave Wyatt no notice of its intent to revoke her licenses. Following inspection visits on May 29, 1998, and July 13, 1998, a DHR worker, Catherine Phillips, sent Wyatt a letter denying the renewal of her nighttime license. Phillips informed Wyatt that she was entitled to an administrative hearing as a result of this adverse action. Wyatt timely requested a fair hearing. Erin Wheeler, the Mobile DHR director, refused the hearing, alleging that Wyatt's licenses had expired prior to her submission of a renewal application. Wyatt contends Catherine Phillips and Hank Jordan of DHR attempted to have her prosecuted for operating without a license, and that she suffered financially because of DHR workers acting in their individual capacities.

On November 6, 1998, Wyatt filed suit in Mobile Circuit Court, seeking injunctive relief to prevent DHR from revoking her licenses without the due process of a fair hearing. The Honorable Robert G. Kendall granted the injunction on December 4, 1998. That case was dismissed without prejudice on April 30, 1999, after DHR granted Wyatt's day care license and granted her request for a fair hearing on the denial of her nighttime license.

After the hearing, the administrative hearing officer issued an order, finding that "the Mobile County Department of Human Resources did not prove by a preponderance of the evidence that Wyatt's application to operate a family nighttime home should have been denied." He reversed DHR'S decision and directed that Wyatt be granted the license.

On February 10, 2000, Wyatt filed a complaint in Mobile Circuit Court against Alabama DHR, Mobile DHR director Erin Wheeler, and Mobile DHR day care licensing worker Catherine Phillips, claiming compensatory and punitive damages. Wheeler and Phillips were sued in both their individual and official capacities. Wyatt's complaint alleged state tort claims and federal and state due process violations in eight counts: Count One negligence in inspection, investigation, and denying license renewal; Count Two -- slander in publishing to others that she was dishonest, was breaking the law, and was going to be prosecuted; Count Three -- outrage for egregious, outrageous, and offensive behavior; Count Four -- wantonness; Count Five -- negligent violation of state and federal statutes; Count Six - - negligent violation of due process rights under both the United States and the Alabama Constitutions; Count Seven - - breach of contract; and

Count Eight - - privacy violations by spreading false and malicious information to others about the private aspects of Wyatt's character and business.The petitioners moved to dismiss the complaint, asserting sovereign immunity. The trial judge denied the motion on May 23, 2000, stating no reason. A motion to reconsider was denied on July 24, 2000, without explanation. The defendants petitioned for a writ of mandamus from the Court of Civil Appeals-That petition was denied on August 22, 2000. This petition followed.

We first consider whether Alabama DHR, Mobile DHR, and Erin wheeler and Catherine Phillips, in their official capacities, are immune from state and federal claims based upon sovereign immunity. Pursuant to 14, Ala. Const. of 1901, the State of Alabama and its agencies have absolute immunity from suit in any court. Ex parte Franklin County Dep't of Human Res., 674 So.2d 1277, 1279 (Ala. 1996). An action suing State employees in their official capacities is considered a complaint against the State, and is also barred by S 14 of the Alabama Constitution Ex parte Alabama Dep't of Forensic Sciences, 709 So.2d 455, 457 (Ala. 1997). As to federal claims, "the Eleventh Amendment prohibits actions seeking a monetary award from a state, state agency or state employee sued in his or her official capacity." Ross v. State, 893 F.Supp. 1545, 1549 (M.D. Ala. 1995). Thus, the motion to dismiss the complaint as to the state and federal claims against Alabama DHR, Mobile DHR, and Erin Wheeler and Catherine Phillips, in their official capacities, is due to be granted.

We next consider whether the trial court abused its discretion in denying the motion to dismiss the federal due

process claims against Wheeler and Phillips in their individual capacities. Those claims are due to be dismissed on the authority of Bowman V. Alabama Department of Human Resources, 857 F.Supp. 1524 (M.D. Ala. 1994). In Bowman. a day care operator brought suit against DHR and its officials for alleged due process violations in its license revocation procedures. The United States District Court held that a day care license is a state-created property right, and, thus, it does not enjoy substantive due process protection. Id. at 1529. The United States District Court then held that post-deprivation remedies made available by the State can satisfy procedural due process rights. Id. at 1530. It is undisputed that there was a fair hearing before an administrative hearing officer, after which Wyatt's nighttime care license was reinstated.

Finally, we consider whether the trial court abused its discretion in denying the motion to dismiss the state claims against Wheeler and Phillips in their individual capacities. In parte Cranman, [Ms. 1971903, June 16, 2000] __ So.2d __ (Ala. 2000), a plurality of this court offered a restatement of the rule governing State-agent immunity:

"A State agent shall be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's"

(1) formulating plans, policies, or designs; or

(1) exercising his or her judgment in the administ-ration of a department or agency of government, including, but not limited to, examples such as:

"(a) making administrative adjudications;

"(b) allocating resources;

"(c) negotiating contracts;

"(d) hiring, firing, transferring, assigning, or supervising personnel; or

"(3) discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; "Notwithstanding anything to the contrary in the foregoing statement of the rule; a State agent be immune from civil liability in his or her personal capacity;

"(1) when the Constitution or laws of the United States, or the Constitution of this State, or laws, rules or regulations of this State enacted or promulgated for the purpose of regulating the activities of a government agency require otherwise; or -

"(2) When the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law."

Id. at ___. (Emphasis added.) That restated rule of immunity was adopted by this Court in Ex parts Butts, 775 So. 2d 173, 177-78 (Ala. 2000) . Wyatt's complaint contains state claims against Wheeler and Phillips individually. This Court has stated that it is not for it to determine, based on the complaint, whether the plaintiff will prevail, but only if she may possibly prevail. Karagan. v. City

of Mobile, 420 So.2d 57, 59 (Ala. 1982). Thus, the trial court did not err in denying the motion to dismiss Wheeler and Phillips in their individual capacities. There has been no discovery in this action. After discovery, Wheeler and Phillips will have the opportunity to move for summary judgment on the ground that they are entitled to State-agent immunity as defined in

Ex parte Cranman.

We grant the petition for writ of mandamus in part, and direct Judge Thomas to enter an order dismissing both the state and federal claims as to Mobile DHR, Alabama DHR, and Wheeler and Phillips, in their official capacities. We deny the petition as to the state claims against Wheeler and Phillips, in their individual capacities.

PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

Moore, C.J., and Houston, Lyons, Brown, Harwood, and Stuart, JJ., concur.

See, J., concurs specially.

SEE, Justice (concurring specially).

Although I disagreed with the discretionary-immunity rule suggested by the plurality in Ex parte Cranman, [Ms. 1971903, June 16, 2000] ___ So. 2d , (Ala. 2000) (See, J., dissenting opinion), and subsequently adopted by this Court in Ex parte 775 So. 2d 173, at 177-78 (Ala. 2000), it is now the law of the State of Alabama. I therefore concur.

"Appendix-F"

IN THE SUPREME COURT OF ALABAMA

(Seal)

September 7, 2001

1992252

Ex parte Mobile County Department of Human Resources et al. PETITION FOR WRIT OF MANDAMUS (In re: Mary Wyatt v. Erin Wheeler et al) (Mobile Circuit Court Number: CV-2000-41 1)

ORDER

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

WOODALL, J. - Moore, C.J., and Houston, See, Lyons, Brown, Harwood, and Stuart, JJ., concur.

(stamp)

Clerk. Supreme Court of Alabama

physical, moral or mental well being of the children in care. During this six-month period, the child-care facility shall correct the items which were in noncompliance and report the corrections to the Department for determination of eligibility for a full license.

The Department cannot consider the issuance of this probationary permit as an alternative to revocation unless the child-care facility has voluntarily surrendered its license to the Department.

V. Suspension of License

En accordance with the Code, Sections 38-7-11 and 41-22-19(d), the Department has the authority to immediately suspend without notice the license/six-month permit/approval if an inspection by the Department of a licensed or approved child care facility disclose any condition, deficiency, dereliction, or abuse, which is, or could be, hazardous to the health, safety, or physical, moral, or mental well-being of the. children in the care of the child care facility being inspected. The suspension may remain in effect for a period of not longer than 120 days and shall not be renewable. The pre-revocation hearing shall be scheduled as soon as possible to give the licensee/permit or Approval holder an opportunity to show why the license/permit/approval should not be revoked. Procedures for the pre-revocation hearing, as outlined in Section III above, will be followed.

VI. Fair Hearing

B. Time for Request

When a pre-revocation hearing has been held, a request for a fair hearing may be filed with either the State or county Department and must be postmarked within 14 calendar days of the notice of revocation. In all other situations where a pre-action hearing has not been held, a request for a fair hearing must be filed and postmarked within 60 calendar days of the date of the action (or inaction) with which the aggrieved person is dissatisfied, in the absence of a legible postmark, the State or County Department will assume the request was mailed three days prior to its receipt. If the aggrieved person or his representative presents a written statement to the State or County Department, the date the statement is presented will be considered the filing date.

B. Status of License during Hearing Period

Any existing license, six-month permit or approval shall remain in effect during the 14 day time period to request a hearing. If a hearing is requested, the existing license, six-month permit or approval shall remain in effect until, and including, 30 days after the final decision of the Department is rendered or 30 days after the final decision on a request for a rehearing.

If the Department determines, and states in writing, that a danger to the public health, safety or welfare requires emergency suspension,